BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

STUDENT, Petitioner, Vs. ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	OAH NO. N2005070756

DECISION

This matter came on regularly for hearing, before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, at Lancaster, California on October 4, 5, 6, 7, and 11, 2005.

Student (petitioner/student) was represented by Warren Finn, Esq.

Bridget L. Cook, Esq. represented the Antelope Valley Union High School District (respondent/district).

Oral and documentary evidence was received, the record was left open, and the matter was continued for good cause to allow the parties to submit written closing arguments/briefs. The parties' written arguments/briefs were received, read, and considered, and the matter was deemed submitted on November 30, 2005.

PROPOSED ISSUES

Petitioner articulates the issues for resolution as follows:

1. Has respondent offered student a Free Appropriate Public Education (FAPE) for the 2005-2006 school year?

2. Was respondent's proposed program designed to provide educational benefit to student?

3. Was respondent's proposed program designed to meet student's unique needs?

4. Did respondent fail in its responsibility to adequately evaluate student's unique needs prior to offering a program?

5. Should respondent be required to continue funding student's program at a private, non-public school (Frostig), in conformity with the May 25, 2005 Individualized Education Program (IEP)?

6. Did respondent violate a procedural safeguard of the student by failing to provide prior written notice to student regarding a change in placement?

7. Did respondent violate a procedural safeguard of the student by failing to adequately assess student's needs before making its FAPE offer?

8. Did respondent violate a procedural safeguard of the student by failing to have the required participants at the June 30, 2005 and August 29, 2005 IEP meetings?

9. Did respondent violate a procedural safeguard of the student by failing to make a clear and timely written offer of placement for student for the 2005-2006 school year?

INTRODUCTION

The reason the previous section is titled "proposed issues" is because all of student's "issues" really boil down to a dispute concerning whether student is ready to transition from a private special education school setting to the public school setting. Student's contentions that respondent committed several procedural violations of the federal Individuals with Disabilities Education Act (IDEA), during the IEP processes, arise from student's belief that she was not properly assessed before respondent sought to change her placement.

ISSUE

Is student ready to transition from a private special education school setting to the public school setting?

FACTUAL FINDINGS

1. Student, whose date of birth is September 11, 1990, is a 15 year-old female.

2. In 1993, student originally qualified for special education services under the category of Specific Learning Disability, due to learning disabilities and speech and language difficulties. During preschool student was placed in a special day class within the Westside Union School District (WUSD). Student continued attending a special day class within the WUSD during kindergarten. Student failed to make adequate progress in her kindergarten class and an IEP team decided that student should repeat kindergarten in a regular education class in the resource program. Student remained in the resource program at Valley View Elementary

School until she completed the fifth grade. In 2002, student began the sixth grade at Joe Walker Middle School. Student was experiencing academic difficulties at Joe Walker Middle School, so she was placed in a special day class. Student experienced great difficulties in the sixth grade special day class setting. She struggled academically and socially. Student began falling further behind in her academic skills and the other students teased and bullied her. Student's parents became extremely concerned and, in October of 2002, they sought the professional advice of Dr. Jordan Witt, a pediatric neuropsychologist with a specialty in learning disorders. Dr. Witt performed a comprehensive psychoeducational evaluation on student. The evaluation disclosed significant academic deficits and challenges. In his report, dated October 7, 2002, Dr. Witt noted that student had "severe difficulties with processing areas associated with dyslexia and dysgraphia, including poor phonemic fluency, limited working memory, and poor graphomotor speed. As a result, her language art skills remain far below expectations for her grade or intellectual level." (Exhibit B.) Dr. Witt diagnosed student with attention deficit disorder, inattentive type, along with cognitive impulsivity and an overall pattern of difficulty with executive skills. Dr. Witt noted that student's executive skills problems were particularly marked and pervasive, affecting many aspects of her work and overall functioning. Dr. Witt then listed numerous recommendations for meeting student's unique needs in the classroom setting.

3. Student's parents were unhappy with student's progress in the sixth grade so they began considering alternative placements. Ultimately, student's parents began focusing on the possibility of placing student at the Marianne Frostig Center of Educational Therapy (Frostig), a private school that offers direct services to students with learning disabilities through enrollment at the Frostig School and through support services provided for students attending other schools, including public schools. Frostig works with public school districts and provides for both public and private placements. After an extensive interview process with the staff at Frostig, student's parents decided to place student at Frostig. This was not an easy decision for student's parents considering that the Frostig campus was located in Pasadena, California and student and her parents live in Palmdale, some 63 miles away; thus requiring student's mother to drive the 123 mile, 2 ½ hour, round-trip journey, each school day. However, based on the perceived best interests of student, student's mother decided the inconvenience was warranted. Consequently, student's parents enrolled student at Frostig for the 2003-2004 school year to start the seventh grade. Student's parents then initiated due process proceedings against the WUSD, seeking approval of the placement and reimbursement of costs. Ultimately, WUSD agreed to fund the Frostig placement and reimburse the parents for associated costs and expenses.

4. Student attended Frostig during the seventh grade (2003-2004) and the eighth grade (2004-2005). WUSD funded student's program during that two-year period. Student's triennial IEP meeting occurred on May 25, 2005. The meeting was held at the Fostig School site and WUSD participated via telephone. The WUSD FAPE offer specifies certain services to be provided through "NPS[1] placement (Frostig School) 5 x week (daily, 314")" starting May

[1] "NPS" means Non-public school.

25, 2005, for "one year." (Exhibit 2.) The parents and all other concerned parties signed the IEP and agreed with its terms and conditions. This was, and is, the last agreed upon IEP.

5. During the May 25, 2005 IEP meeting there was some discussion about the fact that student's progression from the eighth grade into the ninth grade would result in the responsibility for overseeing her education passing from WUSD to respondent. It is unclear from the documents and testimony why respondent had not been invited to participate in the May 25, 2005 IEP process. The May 25, 2005 IEP documents state that "It was agreed that an IEP meeting should be *reconvened* to discuss transition to the high school district" (Exhibit 2); however, the May 25, 2005 IEP documents were signed by all parties and there is no indication that a subsequent, transitional meeting with respondent was intended to be a continuation, or "reconvening," of the May 25, 2005 IEP. It seems, and the ALJ finds, that the parties fully expected that respondent would agree to the Frostig placement and accept responsibility for funding the placement.

6. Sometime prior to June 30, 2005, respondent's school psychologist received a copy of student's May 25, 2005 IEP documents. Respondent reviewed the May 25, 2005 IEP agreement and then requested that student's parents attend a "transitional" IEP meeting on June 30, 2005. At the June 30, 2005 IEP meeting respondent informed student's parents that all of student's goals, objectives and programs would be adopted from the May 25, 2005 IEP documents, as agreed upon; however, student's placement would be changed from Frostig to a public high school setting, within the new district. This "decision" was based on respondent's review of the May 25, 2005 IEP documents, some "more records" that were received from WUSD, and discussions during the June 30, 2005 "transitional" IEP meeting. Although no one from the district had actually seen student or assessed her, district personnel believed, on the basis of the limited information it had, that student's progress was "well within the parameters of students served on district campuses; therefore, [student] was ready for transition." Respondent recommended that student's schedule consist of four special education classes and two regular classes: physical education and literacy, or another elective. Student's parents adamantly disagreed with the proposal. They had agreed to the May 25, 2005 IEP's provisions because the services were being provided at Frostig. Student's parents knew from their two-year experience with Frostig that Frostig was capable of, and did, provide adequate services to meet student's unique needs. Student's parents lacked confidence that respondent could provide the same quality of services in terms of both the actual services specified in the May 25, 2005 IEP, and the environment in which they would be delivered. A battle of the experts ensued.

7. Dr. Witt testified that student has difficulty regulating her behavior and with "getting along with others." It appeared to him that Frostig is "an appropriate setting for [student]" and he saw no specific benefit in having student transfer into a comprehensive high school environment. In fact, Dr. Witt warned that such a transfer may have attendant risks, both social and emotional. Dr. Witt believes that Frostig is the type environment, "among others," that represents the least restrictive environment (LRE) in which student can access the curriculum. Dr. Witt believes that it is inappropriate, at this time, to place student in any

general education classes. Such placement, in his opinion, would adversely impact student's ability to access the curriculum, as well as impede her emotional development.

8. Respondent's expert, the school psychologist, sat through the entire hearing. He read the documents entered into evidence; and, based on all the information, he opined that he heard nothing to change his position that respondent can provide all necessary services to meet student's unique needs on one of its regular high school campuses. Respondent's expert believes that a regular school setting provides the LRE for student and urges the transition on that basis.

9. Frostig's principal, student's teachers, and speech and language pathologists testified during the hearing. Based on all the testimony, it is evident that none of the experts can state, with any degree of reasonable certainty, that student is ready to transition to the public school setting. Student's parents would like nothing better than to have student transfer into the public school setting, when it is appropriate. They would no longer have to spend their days traveling from Palmdale to Pasadena and student would be reaching everyone's ultimate goal of full inclusion in a regular school setting. However, they don't want the district "experimenting" with student. That is, they don't want the district to place student in programs, see if they work and; if not, then "tweek" the programs. Student's parents are willing to have student transition into the public school system but they do not believe that now is the right time and they do not believe respondent has given enough thought to the programs in which it anticipates placing student.

LEGAL CONCLUSIONS

1. Under both state law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Educ. Code § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(9).) As set forth in Finding 4, student's May 25, 2005 IEP, the last agreed upon IEP, establishes that FAPE for student consists of the services listed in the IEP, as provided by Frostig. Then, after the May 25, 2005 IEP process was completed and placement and services for student's FAPE were agreed upon, respondent became involved due to assumption of its obligation to oversee provision of services to student at the high school level. Respondent was not a participant at the May 25, 2005 IEP meeting. None of its representatives agreed to the provisions of the IEP and respondent is not a signatory to the IEP. Accordingly, respondent is not bound by the IEP and was justified in convening further IEP meetings so it could participate in determining how to attend to student's unique needs. By doing so, respondent became the party proposing to change the status quo; it is respondent that seeks to challenge student's last signed, and currently effective, IEP and it is respondent that must shoulder the burden of persuading the ALJ by a preponderance of the evidence that respondent's change from Frostig to the regular high school setting will meet student's unique needs, thus providing her with a FAPE by allowing her to access the curriculum. (*Schaffer* v.

Weast 546 U.S. _____(2005)[2].) An evaluation of all the evidence presented in the present instance leads to the conclusion that none of the experts could state that it is more likely than not that student is ready to make the transition proposed by respondent. The evidence presented in support of each party's position is in equipoise. Consequently, the ALJ concludes that respondent has failed to meet its burden of persuasion justifying a change in placement at this time.

2. California Education Code section 56507, subdivision (d) requires that the extent to which each party prevailed on each issue heard and decided must be indicated in the hearing decision. In the present case, petitioner prevailed on the controlling issue and all sub-issues.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Student's petition is granted. Respondent shall fund petitioner's program, at Frostig, in conformity with the May 25, 2005 IEP.

Dated: December 9, 2005

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ROY W. HEWITT
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

Note: Pursuant to California Education Code section 56505, subdivision (k), the parties have a right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this Decision.

[2] In *Schaffer* v. *Weast*, the Supreme Court states, in pertinent part:

> The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. … the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ.